

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S LICENSE No. 149052(1)
Issued to: Michael W. PLACZKIEWICZ

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2409

Michael W. PLACZKIEWICZ

This appeal has been taken in accordance with 46 U.S.C. 7702(b) and 46 CFR 5.30.

By order dated 14 September 1984, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, suspended Appellant's license for ten months and eighteen days upon finding proved the charge of negligence. The specification found proved alleges that while serving as operator on board the uninspected passenger vessel M/V DEEP SPIN, under authority of his license, on or about 26 June 1984, Appellant failed to navigate the vessel with due regard for existing conditions, while approaching a bend in the Toussaint Channel, causing the vessel to ground.

The hearing was held at Toledo, Ohio, on 9 August and 12 September 1984.

At the hearing, Appellant was represented by professional counsel. He entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of six witnesses and eight documents.

In defense, Appellant offered in evidence his own testimony, the testimony of four witnesses and nine documents.

After the end of the hearing, the Administrative Law Judge rendered a written Decision in which he concluded that the charge and specification had been proved and entered an Order suspending all documents issued to Appellant until 1 August 1985, a period of 10 months and 18 days.

The complete decision was served on 14 September 1984. Appeal was timely filed on 9 October 1984 and perfected on 22 April 1985.

A request for a temporary license was also filed with the Administrative Law Judge on 9 October 1984 and denied on 12 October 1984. That denial was appealed on 15 January 1985.

FINDINGS OF FACT

On 26 June 1984, Appellant was serving as operator on the uninspected passenger vessel, M/V DEEP SPIN, acting under authority of his license, when his inbound vessel, traveling at 18 mph, ran hard aground at the bend of the Toussaint Channel which connects Lake Erie with the Toussaint River in Ohio. The grounding occurred at 2110 in good weather and daylight visibility.

At the time of the grounding, Appellant was returning the vessel to its Toussaint River moorings after completing several hours of fishing with a charter party of seven persons.

The Toussaint Channel, as shown on the chart (I.O. Exhibit One), is approximately one-half mile long. It runs roughly parallel to the western shore of Lake Erie and is separated from the lake to the east by a sandbar. The bend where the grounding occurred is a turn of nearly 90 degrees into the mouth of the Toussaint River.

The channel is marked only by privately maintained aids. However, there is a "no wake" buoy in the river immediately after the bend (inbound) which requires boaters to slow down while still in the bend.

The charted depth of the Toussaint Channel is 1/2-2 feet based on low water datum. The actual depth varies depending on the water level in Lake Erie which can be ascertained from monthly bulletins intended to supplement the chart or local forecasts. On 26 June 1984, the channel depth was about 4 feet.

The 27 foot DEEP SPIN, manufactured by Sportscraft, has a draft of approximately 35 inches, or nearly 3 feet. It is typical of, if not identical to, most of the charter fishing boats which frequently transit Toussaint Channel.

Because of the minimal bottom clearance, many charter boat captains operate at "planing speeds" in the channel, decreasing the vessel's draft to avoid grounding. Appellant was following that practice in that he entered the channel at 18 mph with the vessel "planing."

Appellant's vessel entered the channel behind the M/V LUCKY LADY, another charter boat. There was no other vessel traffic in the channel at that time.

The LUCKY LADY was navigating in the center of the channel. Appellant was proceeding close aboard the sandbar, which he knew

existed, on the right side of the channel about 100 feet behind and slightly to the right of the LUCKY LADY. Shortly after the LUCKY LADY slowed down at the bend and turned into the river, the DEEP SPIN became caught in the LUCKY LADY's right bow wake which pushed the DEEP SPIN to starboard, causing it to run hard aground on the nearby sandbar at 18 mph. Several passengers were injured as a result.

BASES OF APPEAL

Appellant takes this appeal from the order imposed by the Administrative Law Judge. Appellant contends that:

- (1) It was error to apply a presumption of negligence;
- (2) The specification of negligence was not proved by substantial evidence;
- (3) The decision is based on a misapprehension of the evidence;
- (4) The sole specification was not legally sufficient; and
- (5) The sanction imposed is unduly severe and not warranted by the evidence.

APPEARANCE: Merritt W. Green, II of Green, Ashley & Weglian, Toledo, Ohio.

OPINION

Appellant had in effect taken two appeals; one from the decision and order and one from the denial of his request for a temporary license. The latter is untimely and will not be considered. It was made over three months after the denial thus exceeding the 10-day filing limit prescribed by regulation. 46 CFR 5.30-15(a)(1).

I

Appellant contends that it was error to apply a rebuttable presumption of negligence in this case. He does not question the presumption's rationale or effect, but argues that it was inapplicable because the area where the grounding occurred was not "well charted." I disagree.

It is well established in admiralty and in Coast Guard suspension and revocation proceedings that a rebuttable presumption of negligence arises "[w]hen a vessel grounds on a clearly

designated shoal, or in any place where it has no business being..." Appeal Decision 2382 (NILSEN); accord Appeal Decisions 2211 (DUNCAN) and 2133 (SANDLIN); see also Afran Transport Co. v. U.S., 435 F. 2d, 213 (2d Cir. 1970), cert. denied, 404 U.S. 872 (1971). Stated differently, the presumption is applicable when there is substantial evidence showing that the person responsible for the vessel's navigation either knew or should have known of the shoal area when the vessel grounded. see Appeal Decision 2173 (PIERCE), aff'd sub. nom., Commandant v. Pierce, NTSB Order EM-81 (1980) and SANDLIN, supra.

In this case, as the record clearly establishes, Appellant knew of, and in fact was intentionally running close to, the sandbar on which the vessel grounded. Appellant has not contended otherwise. He has only argued to the effect that the shoal was not clearly designated on the chart. Therefore, the presumption arises based on Appellant's actual knowledge alone. I also find, however, that the shoal was clearly designated.

The Administrative Law Judge, relying on DUNCAN, supra, determined the presumption applied because the grounding occurred in a "well-charted area." He also found more specifically that the vessel grounded on a "sandbar at the mouth of the Toussaint River." While not disputing the actual location of the grounding, Appellant, however, also citing DUNCAN, asserts that the presumption was inapplicable because the chart is generally inaccurate and unusable for navigation, and thus the area where the grounding occurred is not "well-charted." Appellant misinterprets DUNCAN. DUNCAN states that the presumption "arises when a vessel grounds on shoals which are designated on the appropriate navigational charts." Accord NILSEN, supra. I find the record contains substantial evidence that the DEEP SPIN grounded on just such a shoal. Therefore, the Administrative Law Judge did not err in applying the presumption.

In short, since Appellant knew of the shoal on which the vessel grounded, the presumption applies. Furthermore, the shoal was clearly designated on the appropriate navigational chart; that too gives rise to the presumption.

II

Appellant asserts that the specification of negligence was not proved because there is not substantial evidence showing he violated the appropriate standard of care. I disagree.

The Administrative Law Judge relied on two independent bases for finding the specification of negligence proved:

- (1) Appellant failed to rebut the presumption of negligence; and
- (2) Appellant violated the appropriate standard of care by:
 - (a) not avoiding the bow wake of the LUCKY LADY;
 - (b) not adequately anticipating the LUCKY LADY's turn and resulting, stronger wake; and
 - (c) by not transiting the channel at a slower speed.

As discussed below, Appellant argues that he complied with the appropriate standard of care i.e., he was without fault.

First, Appellant states that his vessel's position in relation to the LUCKY LADY and the channel was proper because he was not following too close and he could not maneuver to the center of the channel directly behind the LUCKY LADY. Second, he asserts that he properly "handled the problem created by the (LUCKY LADY's) wake." Finally, with respect to his vessel's speed, Appellant argues he could not have "slowed down while still in the channel (without 'squatting' and) ...driv(ing) the prop and rudder into the bottom" and he was not negligent for "keeping his vessel at planning speed all the way through the channel." He concludes, therefore, that "the DEEP SPIN ran aground ...due to the poor condition of the channel and not due to any breach of duty on the part of the respondent."

I find, however , that there is substantial evidence supporting the decision of the Administrative Law Judge. He concluded primarily that Appellant acted negligently by not avoiding the LUCKY LADY's bow wake. That wake was visible and avoidable and its effect of pushing the DEEP SPIN onto the sandbar, which Appellant was purposely close to, was foreseeable. And in fact that effect caused the grounding. Furthermore, the record does not support Appellant's contention that by merely "keeping at least 150 feet between himself and the vessel ahead of him," he acted reasonably and conformed to the standard of care. Instead, under the circumstances, Appellant had a duty to avoid being caught in the LUCKY LADY's bow wake either by navigating directly behind the LUCKY LADY in the center of the channel or by maintaining whatever distance was necessary to avoid the wake while transiting the right side of the channel in a position off the LUCKY LADY's starboard quarter. That conclusion is fully supported by Appellant's own testimony.

Appellant testified that "where I got caught on the wake ... is probably a good quarter mile wide or so... (there is) five foot,

four foot of water all through there... (TR-364)." He also stated that he could have slowed down before entering the channel and followed the LUCKY LADY at a much greater distance (TR-366,382). He further indicated that the channel depth would have allowed him to operate at less than planning speed without grounding had it not been for his proximity to the LUCKY LADY's wake (TR-379).

Appellant's own testimony evidences that he inadequately anticipated the LUCKY LADY's movements (TR-368) and that he could have transited the channel at a slower speed (TR-379). Thus, his other assertions are without merit. (In addition, Appellant states that the Administrative Law Judge found him negligent for operating at "planning speed." The decision states only, however, that Appellant should have operated at a "slower speed," which the record (TR-197, 378) shows could include slower planing speeds.)

In sum, the record shows that Appellant acted negligently because he did not keep his vessel out of the foreseeable and realized effect of the LUCKY LADY's bow wake, he inadequately anticipated the LUCKY LADY's movements, and he should have operated at a slower speed.

III

Appellant argues that the Administrative Law Judge's decision is "based upon a misapprehension of the evidence." I disagree.

Appellant contends that the Administrative Law Judge erred when he determined that Appellant was "somewhere between 75 to 125 feet behind..." the LUCKY LADY.

Although the record contains substantial evidence from which the Administrative Law Judge could have made this finding, he did not find Appellant negligent based upon the distance, whatever it may have been between the DEEP SPIN and the LUCKY LADY. He found instead that Appellant violated the standard by not avoiding the bow wake of the LUCKY LADY. (See section II). He also found that Appellant violated the standard by not adequately anticipating the LUCKY LADY's turn and increased wake and by not operating at a slower speed. Based on the above and on the unrebutted presumption of negligence, he properly concluded Appellant acted negligently and with a disregard for the safety of his passengers.

IV

Appellant asserts that the Administrative Law Judge erred by not withdrawing the sole specification of negligence since it did not adequately describe the specification of the grounding. I disagree.

In general, all specifications must state the "place of offense." 46 CFR 5.05-17(b)(2). Specifically, a "negligence specification must allege particular facts amounting to negligence, or sufficient facts to raise a legal presumption which will substitute for particular facts." LOUVIERE, supra.

The Administrative Law Judge carefully considered whether the specification, which stated the place as "approaching a bend in the Toussaint Channel," was legally sufficient as required by 46 CFR 5.20-65. He found that it was sufficient after the investigating officer indicated he would produce evidence showing the channel is only one-half mile long and has only one bend. The Administrative Law Judge, however, also invited Appellant to offer a motion to dismiss later in the proceedings if Appellant determined such evidence was lacking. Nevertheless, Appellant raised no subsequent objection and all issues were fully litigated.

In that light, Appellant's assertion on appeal that the specification should have been withdrawn because the channel has "several turns and bends" is without merit. It is clear that the specification fulfilled its purpose of "enabl(ing) the person charged to identify the offense so that he will be in position to prepare his defense." 46 CFR 5.05-17(b). In addition, the chart depicts only a single bend which was the approximate location of the grounding. Finally, "(i)t is now generally accepted that there may be no subsequent challenge of issues which are actually litigated, if there was actual notice and adequate opportunity to cure surprise." Kuhn v. Civil Aeronautics Board, 183 F. 2d 839, 841 (D.C. Cir. 1950); see also LOUVIERE, supra.

V

Lastly, Appellant contends that the 10 1/2 month suspension imposed is unduly severe and not warranted by the evidence because it exceeds the scale of Average Orders and it deprives Appellant, who had no prior record, of his sole source of income for 3 months of the 5-months, 1985 charter boat season (approximately May through September). I disagree.

"(T)he sanction imposed at the conclusion of a case is exclusively within the authority and discretion of the Administrative Law Judge. He is not bound by the Scale of Average Orders. 46 CFR 5.20-165(a) and Appeal Decision 2173 (PIERCE)." Appeal Decision 2362 (ARNOLD). Furthermore, with the 5-month season in mind, the Administrative Law Judge imposed an effective suspension of 4 months (September 1984 and May, June and July 1985). The Commandant has affirmed an Administrative Law Judge's "authority to tailor his order appropriately in cases involving seasonal occupation." Appeal Decision 1793 (FARIA). Finally, the

Administrative Law Judge found that Appellant's conduct exhibited a disregard for the safety of his passengers. The sanction, therefore, is not inappropriate.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable regulations. The order is appropriate.

ORDER

The order of the Administrative Law Judge dated at Norfolk, Virginia on 14 September 1984, is AFFIRMED.

B.L. STABILE
Vice Admiral, U.S. Coast Guard
VICE COMMANDANT

Signed at Washington, D.C., this 2nd day of October, 1985.